

Wilson (Migration) [2019] AATA 6764 (20 December 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Nigel Jon Wilson
VISA APPLICANTS:	Ms Lili Wang Miss Zhuyinghan Li
CASE NUMBER:	1806568
DIBP REFERENCE(S):	BCC2017/1205496
MEMBER:	De-Anne Kelly
DATE:	20 December 2019
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 20 December 2019 at 12:22pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine relationship – pooling of financial resources – review applicant's good relationship with his step-child – plans for child's education in Australia – social and family recognition of the relationship – review applicant's lengthy visit to China – discussions about health and diet – education and career plans – decision under review remitted

LEGISLATION

*Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15*

CASES

He v MIBP [2017] FCAFC 206

1.

2.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 January 2018 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
4. The first named visa applicant (the visa applicant) applied for the visa on 29 March 2017 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 because the delegate had significant concern over the sponsor's commitment to the applicant and was not satisfied the evidence provided substantiated the parties claims against all four aspects set out in sub regulation 1.15A(3) (financial, nature of the household, social aspects of the relationship and nature of the person's commitment to each other).
6. The review applicant appeared before the Tribunal on 10 December 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant who gave evidence by telephone with the assistance of a mandarin interpreter.
7. The review applicant was represented in relation to the review by his registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

9. CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in the present case is whether the applicant and the review applicant are in a spousal relationship, as defined by section 5F of the Migration Act.
11. The Tribunal carefully assessed the evidence which comprises the applicants written submissions, supporting evidence provided to the Tribunal and previous documents provided to the Department together with oral evidence the applicant gave to Department officers and evidence provided by the applicant and review applicant in the hearing. The applicant and review applicant presented in a forthright manner answering the Tribunal's questions without hesitation or vagary.
12. The following documents have been provided;
13.
 - Letter dated 12 December, 2018 from Your Visa 4 Australia.
 - Letter dated 15 January, 2019 from your visa for Australia.
 - Three untranslated documents addressed to Nigel Wang Li, handwritten note stating accommodation for Guangzhou and hot pot receipts.
 - Three untranslated Bank of China documents with handwritten note Nigel withdrew the money.

- Three untranslated documents with handwritten note- I going to Guangzhou pick up Nigel ticket.
- Three untranslated documents with handwritten notes regarding taxi and railway fares.
- Three untranslated documents with handwritten note-a receipt for pizza eat with our friends.
- Three untranslated documents with handwritten notes-receipt for trip to supermarket and we take the cableway.
- Four untranslated documents with handwritten note-tickets and invoice for taxi.
- 35 photographs dated December, 2018.
- Four untranslated receipts with handwritten notes - taking taxi to airport and lunch at airport.
- Marriage certificate from People's Republic of China dated 20 October, 2016 between Nigel Wilson and Lili Wang.
- Notarial certificate dated 17 November, 2016 regarding original marriage certificate.
- Statement "Nigel love story", signed Nigel Wilson.
- Statement of affective development dated 1 December, 2016 from Lili Wang.
- Statement of emotional development dated 20 August, 2018 from Lili Wang.
- Certification letter from Mo Liuqing, dated 15 October, 2018.
- Letter from Wei Xu dated 15 October, 2015.
- Letter from Wang Junxiang cousin of Lili Wang dated 15 October, 2018.
- Letter from Mo Liuqing friend of Lili Wang dated 15 October 2018.
- Passport for Nigel Jon Wilson.
- Drivers licence for Nigel Jon Wilson.
- Passport for Lili Wang.
- Passport for Li Zhuyinghan.
- Divorce certificate dated 5 May, 2014 for Lili Wang and Li Jin.
- Declaration by Li Jin regarding daughter Li Zhuyinghan.
- 85 photographs dated June 2018.
- 149 untranslated receipts.
- 42 photographs dated February 2018.
- Various photos of shoes and clothing.
- Phone accounts for Lili Wang dated January to Sep 2018.
- Phone accounts for unnamed dated January 2 May 2019
- We chat messages with handwritten note stating 2019
- Three undated photos handwritten note 31 May, 2018.
- 62 photos dated June 2018.
- Boarding pass on China Southern dated 31 May for Nigel Jon Wilson.
- Boarding pass on China Southern dated 19 October for Nigel Jon Wilson.
- Boarding pass dated 4 September, 2019 return ticket Brisbane to Guangzhou.
- International money transfers from Nigel Jon Wilson to Lili Wang for \$500 each dated 26 April, 2018, 17 March, 2018 and 14 July, 2018; \$600 dated 24 September, 2018; \$600 dated 1 August, 2019
- 46 photos dated October 2018.
- Two receipts for goods from Myer.
- Statutory declaration from Nigel Jon Wilson dated 29 November, 2019.

Whether the parties are in a spouse or de facto relationship

14. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there

must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant and review applicant provided a translated marriage certificate notarised by the Liuzhou notary public office and stating that the couple were married on 20 October, 2016. The applicant Ms Lili Wang provided divorce papers notarised by the Liuzhou notary public office showing she was divorced from her ex-husband on 5 May, 2014. The review applicant Mr Nigel Wilson has not previously been married. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

17. **Financial aspects of the relationship** – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
18. Joint ownership of assets: the applicant and review applicant did not provide any evidence to the Tribunal regarding joint ownership of assets nor did they claim to have any assets in joint names. The review applicant stated that he had nominated the applicant as the beneficiary of his superannuation policy. The review applicant has a high income as a shift worker using heavy machinery and has been with his firm for 12 years so his superannuation lump sum would comprise a considerable amount. The Tribunal accepted the veracity of this statement.
19. Joint liabilities: the applicant and review applicant did not provide any evidence to the Tribunal regarding joint liabilities and did not state they have any joint liabilities.
20. Extent of pooling of financial resources: the review applicant provided evidence of money transfers to Lili Wang for \$500 each dated 26 April, 2018, 17 March, 2018 and 14 July, 2018; \$600 dated 24 September, 2018 and \$600 dated 1 August, 2019. Both the review applicant and applicant are in paid employment and able to meet their own living expenses. The applicant advised that money is sent to her to enjoy special festivals and buy clothes for her daughter. This was confirmed by the review applicant.
21. Any sharing of day-to-day household expenses: the review applicant claimed that he lives with the applicant and her daughter during his visits to China and he pays for food and any hotel accommodation during their travels while the applicant pays for transport and power bills.
22. Financial aspects conclusion: the Tribunal gives modest weight to the cumulative evidence presented regarding the financial aspects of the relationship between the applicant and review applicant as demonstrating that relationship is a mutual commitment to a shared life together to the exclusion of all others; being a genuine and continual relationship and that they are intending to live together, or not separately and apart on a permanent basis but

acknowledges that this modest weighting results from the fact, the applicant and review applicant are living in separate countries and have little opportunity to build a financial portfolio together.

23. The nature of the household

24. Any joint responsibility for the care and support of children: photographs tended to the Tribunal shows the review applicant and the child in numerous happy family situations. The review applicant states the child meets him at the airport with her mother and he takes her to and from school when he is in China either by scooter or bus. The child has also introduced him to her school. He advised that she looks out for him when he is in China as bad things can happen. The couple referred to the child as our daughter. The applicant confirmed the review applicant's statements saying he has a good relationship with the child and they share videos on phones and play some video games. She said sometimes the child and review applicant hold hands while she walks by herself. She told her daughter to "watch daddy as traffic in China is disorderly". The review applicant has already canvassed apartments for the family to rent in the Sunnybank area near an international school that would cater to a child with limited English.
25. The living arrangement of the applicants: the review applicant and applicant advised on his trips to China he lives with the applicant in her apartment. These trips are 21 September to 10 October, 2015; 16 October to 6 November, 2016; 13 February to 27 February, 2018; 31 May to 16 June, 2018; 19 October to 4 November, 2018 and 22 December 2018 to 1 January, 2019.
26. The Tribunal accepts the veracity of these claims.
27. Any sharing of responsibility for housework: when the couple are together the review applicant stated that the applicant does the household cleaning and also the cooking as he is still learning to cook Chinese food.
28. Household aspects conclusion: the Tribunal places substantial weight on the cumulative evidence presented regarding the nature of the household as being one which demonstrates the relationship between the applicant and review applicant as being a mutual commitment to a shared life together to the exclusion of all others, being a genuine and continuing relationship and that they are intending to live together, or not separately and apart on a permanent basis, in that it is satisfied on the evidence before it that on the occasions when the applicant and review applicant had the opportunity to live together, they have done so. Moreover, the applicant and review applicant have assumed responsibility for the care and support of the child.

29. The social aspects of the relationship.

30. Whether the persons represent themselves to other people as being married to each other: there are numerous photos of the couple together in China with other people. The review applicant's mother died in 2015 and he has a poor relationship with his father who has a new partner. This was confirmed by the applicant who was aware that the review applicant had a sister who lived in Sydney and worked in a hotel. The sister is a single mother of six children and would not be in a position to attend the wedding or write letters of support. The review applicant stated that his Chinese friends in Australia and his manager and colleagues at work were aware that he was married and he was looking forward to introducing his wife to them.
31. The opinion of friends and acquaintances about the nature of the relationship: the applicant's mother lives in Australia and has travelled to China with her son-in-law on occasion. A

number of statements translated from Chinese and purporting to have been written by friends and relatives of the applicants attesting to their happy and genuine relationship were provided to the Tribunal. There were similar distinctive phrases in all the letters and when this was queried by the Tribunal, the review applicant said it may be because in China there are standard and customised responses to social situations. The Tribunal gives these statements limited weight.

32. Any basis on which the persons plan and undertake joint social activities: the applicant and sponsor provided numerous photographs of the social and sightseeing activities they undertake together with the child when they are in China together. The Tribunal considers that this demonstrates an acceptable level of shared social activities.
33. Social aspects conclusion: the Tribunal gives considerable weight to the cumulative evidence presented regarding the nature of the social aspects of the relationship between the review applicant and applicant as being one which exhibits a mutual commitment to a shared life together to the exclusion of all others, being a genuine and continuing relationship and that they are intending to live together, or not separately and apart on a permanent basis.
34. **The nature of the person's commitment to each other.**
35. The duration of the relationship: the review applicant is 42 years of age and was looking for his "true girlfriend, my love and my wife for a long time". The couple first began communicating on we chat in March 2015 after being introduced by a mutual friend and met in person in China on 21 September, 2015.
36. The couple have spent in total 12 and a half weeks living together since they first met. When asked why there was no travel to China in 2019 the review applicant responded that he had bought a ticket in July for October travel but had cancelled as he was worried about the Tribunal possibly calling a hearing. The applicant broadly confirmed this as well. The review applicant had stated that the seven weeks he had spent in China in 2018 had been frowned upon by his employer and he had to undertake a great deal of overtime to compensate for the time abroad.
37. The departmental delegate placed weight on the fact that in 2017 the review applicant rather than visiting his wife in China chose instead to spend a week in Thailand and had misled his wife about this trip. The delegate believed the review applicant had deliberately misled his wife by sending her a photo of him at Melbourne airport when he was in fact flying from Brisbane to Bangkok. The review applicant advised that he had travelled to Melbourne for work-related training and while there had learned of the death of an old friend who had lived in Thailand. He said he knew that many people had preconceptions of what occurred on trips to Thailand but he visited there to spend time with a retired couple he had known for many years. He decided to fly to Thailand to pay his respects and with the last-minute arrangements was too stressed to tell his wife. The applicant confirmed these details.
38. The review applicant had purchased a new Honda car and following the trip to Thailand and did not have the finances for a trip to China in the same year.
39. The Tribunal accepted these claims.
40. On the evidence before the Tribunal, it is satisfied that at the time of application the applicant and review applicant had been in a committed relationship for one year and 6 months and at the time of this decision, for 4 years and 3 months.

41. The length of time during which the persons have lived together: on the evidence before it, the Tribunal finds, as a result of the applicant and her daughter not yet having a residence Visa, the couple have lived together for 12 and a half weeks.
42. The degree of companionship and emotional support the persons draw from each other: the we chat messages indicate a mature and settled relationship as would be expected of a couple that had been married for over 3 years and were in their late thirties and early forties. The couple discuss every day events; matters concerning their daughter and offer one another support over adverse events. The applicant is particularly concerned about the review applicant's diet and health and offers helpful advice on these matters.
43. Whether the persons see the relationship as a long-term one: when questioned about their plans for the future the applicant and review applicant both demonstrated that they had discussed their future together and made detailed plans. They both want to rent initially near an international school suited to their daughter and then purchase probably an apartment near to work and suitable schools. The applicant works in a chemist shop in China and initially plans to work in a supermarket in Australia and as her English improves to find work in a hotel or perhaps pharmacy. The couple had discussed having a child of their own and were favourably inclined to have a baby of their own.
44. Commitment conclusion: the Tribunal places significant weight on the cumulative evidence presented regarding the nature of the person's commitment to each other as being one where the relationship between the applicant and review applicant exhibits a mutual commitment to a shared life together to the exclusion of all others, being a genuine and continuing relationship and that it is their intention to live together for the long-term, or not separately and apart on a permanent basis.

Any other relevant considerations.

45. The Tribunal queried the fact that the child was listed on her biological father's household register as living at his address. The applicant had explained that she had divorced her first husband because he had a serious drinking and gambling problem: had become verbally abusive and she worried his actions would harm the child. The Tribunal wondered why she would allow her child to apparently live with an ex-husband who posed a risk to the child. The visa applicant explained that her daughter needed to live there to go to that school as that address is best for the school catchment. She goes to her biological father's home for lunch from the school and for an afternoon nap and on occasion she stays one or two days. The visa applicant explained that her ex-husband now cares for his elderly mother at home and as a result the drinking is no longer the significant problem it used to be. Recently while her daughter was at the house, the elderly mother fell and injured her pelvis and is now largely immobile. The Tribunal accepted this explanation.

Overall conclusions.

46. For the above reasons, having carefully considered each of the prescribed factors under s.5F(2)(a-d), the Tribunal is satisfied that, at the time of Visa application and at the time of this decision, the Visa applicant and review applicant were in a genuine and continuing relationship and had a mutual commitment to a shared life together to the exclusion of all others and have lived together, or not separately or apart on a permanent basis, other than as caused by the applicants living in different countries.
47. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
48. Therefore, the visa applicant meets cl.309.211 and cl.309.221.

49. On the evidence before it, the Tribunal is satisfied that the secondary applicant is a dependent member of the family unit of the primary applicant and made a combined application with, a person who satisfies the primary criteria in s.309.21
50. Therefore, the secondary applicant meets cl.309.311.
51. Given the findings above, the appropriate course is to remit the applications by the primary and secondary applicant's for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

52. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

De-Anne Kelly
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).